Supreme Court U. S.
FILED
NOV 16 197
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-749, Misc., October Term 1978

COMMONWEALTH OF KENTUCKY
Petitioner

V. MOTION TO PROCEED IN FORMA PAUPERIS

HAROLD WHORTON
Respondent

Comes Terrence R. Fitzgerald, counsel for the respondent, and states that the respondent has proceeded as a pauper without the payment of fees and costs throughout the proceedings in the state court below, that the respondent has been found by the Jefferson District Public Defender and the state courts to qualify as an indigent and to have appointed counsel throughout the proceedings below, that counsel was appointed by the Jefferson Circuit Court to represent the respondent, and he is therefore entitled to proceed herein without prepayment of fees, costs or security herein. An affidavit of indigency and an order of the Jefferson Circuit Court permitting the respondent to proceed in forma pauperis in the state courts are attached hereto.

CERTIFICATE

I do hereby certify that a copy of this motion was served by depositing the same in a United States mail box, with first class postage prepaid, to Hon. Patrick B. Kimberlin, III, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, on November 15, 1978.

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
200 CIVIC PLAZA
701 WEST JEFFERSON STREET
LOUISVILLE, KENTUCKY 40202
(502) 587-3800
COUNSEL FOR PETITIONER

NO. 157391
157406
157667

JEFFERSON CIRCUIT COURT

CRIMINAL BRANCH

FOURTEENTH DIVISION

FILED IN OPEN COURT

OCT 7 1977

PAULIE MILLER, Clerk

By Charles E. Talbert
Deputy Clerk

COMMONWEALTH OF KENTUCKY — PLAINTIFF

V.

MOTION TO PROCEED WITH APPEAL

IN FORMA PAUPERIS

HAROLD WHORTON — DEFENDANT

* * * * * * * * * *

Comes the defendant, by counsel, and states that he is a poor person and unable to pay attorney fees or costs of an appeal or give security thereof, and he is therefore entitled to proceed in forma pauperis and to have counsel appointed for the purpose of this appeal.

WHEREFORE, the defendant moves the Court to enter the order set out below.

CERTIFICATE

This is to certify that a copy of the foregoing was duly served on the Commonwealth's attorney, or his agent, on this the 7th day of OCTOBER, 1977.

John B. Southard, Jr.

JOHN B. SOUTHARD, JR.
ASSISTANT DISTRICT DEFENDER
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville Kentucky 40202

O R D E R

IT IS HEREBY ORDERED that the defendant, Harold Whorton, be permitted to proceed in forma pauperis, on appeal, and the Jefferson District Public Defender is hereby appointed as counsel for the defendant for the purpose of the appeal.

ENTERED Oct. 7, 1977

JUDGE

IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-749, Misc., October Term 1978

AFFIDAVIT OF INDIGENCY

Supreme Court, U. S.
FILED
NOV 27 1978
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COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

Comes the affiant, Harold Whorton (NMI),

being first duly sworn, and says as provided in KRS 31.120, that he is not now represented by private counsel and that he does not have the money or assets out of which to employ one; that he is indigent and requests the court to appoint counsel.

Affiant states that his income is $8.50 PER MO. EIGHT DOLLARS AND FIFTY CENTS PER MONTH; that he owns the following property:

Description	Value
None	0
None	0
None	0

that he has the following dependents:

Name	Age	Relationship
Lillie P. Whorton	32	Wife
Derrell Whorton	15	Son
Patricia Whorton	12	Daughter
David Whorton	11	Son
Lisa Whorton	8	Daughter

and that he has the following obligations:

To Whom Owed	Amount Owing
None	0

Harold Whorton
Signature of Affiant

Subscribed and sworn to before me this 15 day of Nov., 1978.

John R Shep
NOTARY PUBLIC
STATE-AT-LARGE

My Commission Expires: 28 July 1980

*******Any person making false statements in the above affidavit shall be subject to the penalties for perjury under KRS Chapter 523, the maximum penalty for which is five years imprisonment.

IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-749, Misc., October Term 1978

COMMONWEALTH OF KENTUCKY
Petitioner

V.

HAROLD WHORTON
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
CHIEF APPELLATE DEFENDER OF THE
JEFFERSON DISTRICT PUBLIC DEFENDER
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(502) 587-3800
COUNSEL FOR PETITIONER

Daniel T. Goyette
DANIEL T. GOYETTE
DEPUTY DEFENDER
JEFFERSON DISTRICT PUBLIC DEFENDER
OF COUNSEL

CERTIFICATE OF SERVICE

I do hereby certify that a copy of this petition was served by depositing the same in a United States mail box, with first class postage prepaid to Hon. Patrick B. Kimberlin, III, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on November 15, 1978.

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-749

COMMONWEALTH OF KENTUCKY,
Petitioner

V.

HAROLD WHORTON,
Respondent

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

WHETHER THE KENTUCKY SUPREME COURT PROPERLY DECLINED TO TREAT THE FAILURE OF THE TRIAL COURT TO GIVE A REQUESTED PRESUMPTION OF INNOCENCE INSTRUCTION IS HARMLESS ERROR.

REASONS FOR DENYING THE WRIT

In the Petition for Writ of Certiorari submitted by the Attorney General of Kentucky, it is argued that the Kentucky Supreme Court "misinterpreted and incorrectly" applied the holding of this court in Taylor v. Kentucky, 436 U.S.____, 98 S.Ct. 1930, ____ L.Ed.2d____(rendered May 30, 1978). Specifically, the petition states:

> [The Supreme Court of Kentucky] has interpreted "Taylor to mean that when an instruction on the presumption of innocence is asked for and denied there is reversible error." This interpretation requires automatic reversal in every such case regardless of the circumstances of the trial or the possible application of harmless error principles. We believe such an interpretation of Taylor v. Kentucky is wrong.

The attorney general now asks this court to exercise its extraordinary and discretionary jurisdiction on the premise that the failure to give a requested presumption of innocence instruction is subject to the harmless error rule. This argument was thoroughly examined by the Kentucky Supreme Court in a Petition for Rehearing and Modification which was subsequently denied on October 10, 1978. In addition, the court demonstrated its agreement with Taylor by amending the state procedural rules to require a presumption of innocence instruction in every criminal case whether requested or not. (Kentucky Rules of Criminal Procedure 9.56, effective July 1, 1978). Thus, it is evident that the decisions in Taylor and in the case at bar will not result in the wholesale reversal of criminal convictions, nor will the decisions cause confusion or disrupt the criminal justice process. Therefore, the instant case does not present a proper vehicle for the exercise of the discretionary powers of this court.

The thrust of the petitioner's argument is based on two interrelated premises: (1) Taylor is subject to the harmless error rule, and (2) Taylor is limited to the particular facts of that case. However, this position is clearly wrong. As the majority opinion of the Kentucky Supreme Court correctly noted,

nothing in Taylor supports the conclusion that the error can ever be harmless. Indeed, the majority and concurring opinions stress the special significance of the presumption of innocence and note that "its enforcement lies at the foundation of the administration of our criminal laws" and that it is a "basic component of a fair trial under our system of criminal justice."

A review of case law relating to harmless constitutional error establishes principles from which it may be readily seen that the failure to give a presumption of innocence instruction is not subject to the harmless error rule. In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), at 87 S.Ct. 828, the court ratified earlier cases holding that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." In the footnote accompanying the text, the court noted the following errors, which are so fundamental as to preclude a finding of harmless error: Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958) (coerced confession); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9. L.Ed.2d 799 (1963) (right to counsel), [reaffirmed in Holloway v. Arkansas, ____U.S.____,98 S.Ct. 1173, ____L.Ed.2d____(1978)]; Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (impartial judge).

In Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969), the court held that a denial of the right to confront a nontestifying codefendant whose out-of-court statements were admitted into evidence was subject to the harmless error rule. However, the holding in Harrington appears to have been stripped of its vitality by the subsequent holding in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). In Davis, defense counsel was not permitted on cross-examination to show that the prosecuting witness had a juvenile record which might have made him susceptible to prosecutorial influence. The court squarely held, at 94 S.Ct. 1111:

> Petitioner was thus denied the right of effective cross-examination which " would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. Brookhart v. Janis, 384 U.S.1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314." Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968). (Emphasis added).

By this holding, the right of confrontation appears to have joined the other fundamental rights previously noted in Chapman.

The principle to be distilled from these cases is that any constitutional right which affects the integrity or fundamental fairness of the proceedings is exempt from the harmless error rule. Unquestionably, the presumption of innocence is such a fundamental right. As the court noted in Taylor at 98 S.Ct. 1935:

> While use of the particular phrase "presumption of innocence" - or any other form of words - may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard "against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S., at 503, 96 S.Ct., at 1693 (emphasis added). The "purging" effect of an instruction on the presumption of innocence, Thaxton, 483 F.2d, at 1073, simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial.

The Court has thus recognized that the purpose of this instruction is to safeguard a reasonable doubt standard and to insure that the accused receives a fair trial based solely on the evidence. Thus, the right to a presumption of innocence instruction is based on a concern for the integrity and fairness of the proceedings which renders the harmless error rule inapplicable.

In addition to the foregoing policy reasons for exempting certain errors from the harmless error rule, there is a simple practical reason for the exemptions. If a trial court commits mere evidentiary or procedural error, the record may be expected to contain sufficient information from which the impact of the error can be fairly assessed. By contrast, when an error of omission of the first constitutional magnitude has occurred, the record simply does not contain an adequate basis for determining the impact of the error. For example, in Holloway v. Arkansas, supra, the same attorney represented multiple defendants. The potential for a conflict of interest was held to render his assistance ineffective,

even though no actual ineffectiveness appeared on the record. Indeed, any other holding would have required the reviewing court to engage in speculations about the subjective mental state of the attorney. See also Gideon v. Wainwright, supra, in which the impossibility of determining the effect of the denial of counsel was noted.

The same practical impediment to the application of the harmless error rule in cases where the right to counsel has been denied also exists in the other classes of cases which have been exempted from the rule. In Davis v. Alaska, supra, the court appears to have recognized the impossibility of attempting to predict the impact on the jury which defective confrontation and cross-examination might have had. Similarly, in Payne v. Arkansas, supra, the court refused to speculate on the impact which a coerced confession might have had on the jury. Again, in Tumey v. Ohio, supra, the court adopted a prophylactic rule in order to avoid inquiring into the subjective mental state of a judge with a financial interest in the litigation.

It is obvious that the same impediment tothe application of the harmless error rule exists whenever a presumption of innocence instruction is denied. In order to assess the potential impact of the required instruction, a reviewing court would have to engage in considerable speculation about the attitudes of the jurors toward the presumption of innocence. Moreover, the reviewing court would have to speculate about the thought processes of the jurors and their discussion during the course of the deliberation. Such speculation vitiates the very reasonable doubt standard which gives rise to the presumption of innocence. For this reason, the failure to give an instruction on the presumption of innocence cannot be made subject to the harmless error rule.

Moreover, it is important to note that the harmless error argument advanced by the petitioner was first made in the petition for Rehearing and Modification in the state court. The petitioner's initial brief on appeal omitted any discussion of the harmless error issue, even though the brief submitted by Whorton clearly addressed this very point. Thus, the petitioner now seeks to have this court adopt a position which was not sought in the state courts at the first opportunity, and which should clearly have been anticipated and responded to at the earliest stage of the proceedings.

The purpose of requiring a presumption of innocence instruction is to "impress upon the jury the importance of the right to have the guilt or innocence of every criminal defendant determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." If this Court limits Taylor before the holding can have any repercussions in other criminal cases, many state courts will no doubt choose to play "constitutional roulette" by excusing the absence of a Taylor instruction frequently instead of enforcing the spirit of Taylor uniformly. As a consequence, the federal courts will be inundated with requests for constitutional review on a case by case basis before the salutary effect of a Taylor instruction can be determined from experience. Justice and judicial economy favor a period of implementation before a rational decision on limitation can be made.

In declining to apply the harmless error rule, the state court below stated:

> We know very well that in actuality Taylor was no more "prejudiced" in his case than Whorton was in this one. Yet Taylor contains no hint that it might have been appropriate to consider whether the error was in fact prejudicial.

Thus, the state court has found that a degree of "prejudice" comparable to that which required a new trial in Taylor is also present in case at bar. The state court merely disagreed with this Court's assessment that prejudice was present in Taylor. Therefore, it would be unwise to limit Taylor and give the state court below free rein to make its own assessment of prejudice on a case by case basis.

CONCLUSION

The issue presented by Petitioner alleging misinterpretation and misapplication of Taylor v. Kentucky is without merit for the reasons stated herein. Accordingly, the petitioner's application for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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